

: C.A. NO. S12C-05-018-THG

Plaintiff,

V.

SUSSEX COUNTY, a political subdivision of the State of Delaware; MICHAEL H. VINCENT, Sussex County Council President; SAMUEL R. WILSON, Sussex County Council Vice President; JOAN R. DEAVER, Sussex County Council Councilwoman; GEORGE B. COLE, Sussex County Council Councilman; VANCE C. PHILLIPS, Sussex County Council Councilman; TODD F. LAWSON, Sussex County Administrator; and the STATE OF DELAWARE

Defendants.

**ANSWERING BRIEF OF DEFENDANTS, SUSSEX COUNTY, MICHAEL H. VINCENT,
SAMUEL R. WILSON, JOAN R. DEAVER, GEORGE B. COLE, VANCE C. PHILLIPS,
AND TODD F. LAWSON ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Submitted by:

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By: /s/ David N. Rutt

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Dated: December 14, 2012

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NATURE AND STAGE OF PROCEEDINGS

Defendants, Sussex County, Michael H. Vincent, Samuel R. Wilson, Joan R. Deaver, George B. Cole, Vance C. Phillips, and Todd F. Lawson (hereafter collectively referred to as “County”), direct the Court to the Nature and Stage of Proceedings set forth in County’s Opening Brief on the Cross-Motions for Summary Judgment. All parties to this action filed simultaneous Opening Briefs on October 26, 2010.¹

The parties originally stipulated that simultaneous Answering Briefs would be filed on December 7, 2012, but by stipulation that date was amended to December 14, 2012. This is Sussex County’s Answering Brief to the Opening Brief filed by Plaintiff, Jeffrey S. Christopher. The parties have further stipulated that no reply briefs shall be filed. Thus, the filing of the Answering Briefs completes the submission of the parties’ contentions in support of their respective Motions for Summary Judgment.

¹ Referenced hereafter as follows:

- a. County’s Opening Brief (“COB”);
- b. Plaintiff’s Opening Brief (“Christopher”) or (“POB”);
- c. State’s Opening Brief or (“SOB”).

COUNTERSTATEMENT OF PLAINTIFF'S FACTS

In his Opening Brief, Plaintiff set forth at length what he terms a Statement of Facts (POB, pp. 3-7). Most of what was stated was a regurgitation of the paragraphs in Plaintiff's Second Amended Complaint. For the most part, those "facts" had been denied in the answers filed by the County or the State. Thus, the "facts" recited by Plaintiff in his Opening Brief were disputed and therefore cannot be the basis for entry of summary judgment in favor of the Plaintiff. Polaski v. Dover Downs, Inc., 49 A.3d 1193 (DE, 2012).

In the Stipulation filed herein establishing the briefing schedule, the parties agreed that the matter before the Court is a question of law and thus will turn on the statutory and case law of this State. To the extent there are undisputed facts in this case upon which the Court may rely, the Court's attention is directed to the facts set forth in County's Opening Brief. The facts set forth therein are those which have been agreed to by the parties as not in dispute through the pleadings filed in this case.

QUESTIONS INVOLVED AND SUMMARY OF ARGUMENT

Plaintiff has identified four (4) questions which shall be answered by County in this

Answering Brief. The questions and the summary of County's response are:

- I. Sheriff Christopher Is The Chief Law Enforcement Officer of Sussex County.
County Response: Sheriff Christopher Is Not The Chief Law Enforcement Officer of Sussex County since A Sheriff In The State Of Delaware Is Not Recognized As Such
- II. Sheriff Christopher Has Full Constitutional Authority To Exercise The Powers Necessary to Conserve The Peace.
County Response: The Delaware Constitution of 1897 Identifies The Sheriff As Conservator Of The Peace Within Sussex County But That Term Is Not Defined
- III. Sheriff Christopher's Constitutional Authority Shall Not Be Abrogated, Transferred, Or Diminished Without A Constitutional Amendment.
County Response: Sheriff Christophe Has No Defined Powers Under The Delaware Constitution With All Powers He Has Conferred By Statute
- IV. The Court Should Issue A Declaratory Judgment That The Act Is Unconstitutional.
County Response: House Bill 325 Is Constitutional

ARGUMENT

I. SHERIFF CHRISTOPHER IS NOT THE CHIEF LAW ENFORCEMENT OFFICER OF SUSSEX COUNTY SINCE A SHERIFF IN THE STATE OF DELAWARE IS NOT RECOGNIZED AS SUCH

Plaintiff asks this Court to find that he is “the chief law enforcement officer of Sussex County” (POB, p. 8). To do so would require this Court to reject prior court decisions and to ignore statutory law.

It is undisputed that the Delaware Constitution of 1776 and its subsequent progeny do not enumerate the powers of a sheriff in the State of Delaware. Plaintiff has failed to direct the Court to any such powers relying in its stead on what Plaintiff avers are the common law duties and powers of a sheriff in existence when Delaware first became a state.

Yet, Plaintiff’s argument is more akin to a history lesson on various tasks of a sheriff in England than a review of the powers of a sheriff in Delaware in 1776. In fact, there are no references to what role the sheriff had in government at that time. Rather, Plaintiff points to decisions in Pennsylvania, Ohio, Maine, and Kansas. Only one of those jurisdictions, Pennsylvania, existed in 1776. Plaintiff cites Commonwealth v. Leet, 641 A.2d 299 (Pa. 1994) for the proposition that the sheriff is the chief law enforcement officer of a county. However, the Court in that case noted such authority subject to the caveat, “...that such powers have not been abrogated by statute or otherwise.” Leet at page 301. Chief Justice Nix dissented in Leet and at page 304 noted that the Pennsylvania Constitution “...neither explains nor provides any duties for the sheriff.” He reviewed Pennsylvania statutes finding the sheriffs were not law enforcement officers and concluded, “In my view, the common law powers of the sheriff have been abrogated by statute and, on that basis, I dissent.” Leet at page 304.

The Delaware Constitution of 1776 mentions a sheriff only insofar as how they are to be appointed. Article XV states:

The sheriffs and coroners of the respective counties shall be chosen annually, as heretofore; and any person, having served three years as sheriff, shall be ineligible for three years after; and the president and privy council shall have the appointment of such of the two candidates, returned for said offices of sheriff and coroner, as they shall think best qualified, in the same manner that the governor heretofore enjoyed this power. Del. Const. Art. XV (1776).

There are no enumerated powers for the sheriff, and specifically he is not a “conservator of the peace” as argued by Plaintiff; that designation in 1776 being conferred on Justices of the Courts of Common Pleas. Del. Const. Art. XII (1776).

The Attorney General was asked by then Secretary of the Department of Public Safety Bushweller in 2000 to render an opinion whether the Sheriff of Sussex County was a police officer. By Attorney General Opinion entitled “Opinion of the Attorney General relating to the Sheriff as a Police Officer,” dated October 16, 2000 (attached to COB as Exhibit E), the Attorney General enumerated those officials which by Delaware law are identified as police officers. The sheriffs of the respective counties were not listed. In an Order issued by the Delaware Supreme Court on January 6, 2012 in the matter of Watson v. State, No. 335, 2009 (DE., 2010) (unpublished, but attached to COB as Exhibit F), the Supreme Court held:

We applaud “persons like constables, parole officers, correctional officers and the Attorney General and her Deputy Attorney General,” for their commendable services and recognize that they have certain law enforcement authority; nevertheless, that does not define them as police officers.... Because certain officers...are not members of one of the enumerated police departments, they...are not police officers within the meaning of the statute. COB, Exhibit F, p. 6.

Thus, the Delaware Supreme Court has found that by statute an official can or cannot be designated as a police officer, and similarly not designated as a law enforcement officer. By

statute and case law, Plaintiff is not a law enforcement officer, let alone chief law enforcement officer of Sussex County.

A. **THOUGH SHERIFF CHRISTOPHER IS NOT AN EMPLOYEE OF SUSSEX COUNTY, HE IS A COUNTY AND NOT A STATE OFFICIAL**

Article III, Section 23 of the Delaware Constitution of 1897 is entitled, “Election and term of office of certain county officers; commission.” It reads:

The terms of office of Clerks of the Peace, Register of Wills, Recorders and Sheriffs shall be 4 years. These officers shall be chosen by the qualified electors of the respective counties at general elections, and be commissioned by the Governor. Del. Const. Art. III, Sec. 22 (1897).

Plaintiff twists the Delaware Constitution of 1897 to argue that the sheriff is an officer of the State (POB, p. 10). To do so ignores the title and plain language of this section of the Constitution. The Sheriff, like the Clerk of the Peace or Recorder of Deeds is a County Row officer. As such, he is a County officer, not a State officer. Sheriff Christopher is paid by the County and all funding for his office is through the County budgeting process pursuant to 9 Del.C., §7002(n). (See Affidavit of Susan Webb, Sussex County Director of Finance attached as Answering Brief Exhibit 1.) His salary is the same as all other Row offices of the County, and he is the recipient of benefits from the County, to wit, medical, vision, and dental insurance, pensions, and the use of a County vehicle (Webb Affidavit, Exhibit 1). As a Row officer he has the flexibility to set his own schedule but still reports to Sussex County Council (Webb Affidavit, Exhibit 1). Pursuant to Title 10 Chapter 21, the County pays for all of the deputies who are County employees and who are subject to the County personnel system pursuant to 9 Del.C., §7006, (Webb Affidavit, Exhibit 1). The County also provides the office for Sheriff Christopher in a County office building and pays expenses necessary to operate the Sheriff’s

Department, including, but not limited to, telephones, office equipment, paper, vehicles, and fuel (Webb Affidavit, Exhibit 1).

Again, Plaintiff is unable to direct the Court to any citation that supports his proposition that he is not a County employee or more properly a County official. Rather, he points to case law in other jurisdictions, relying heavily on Georgia. As has been shown, however, Delaware has directly addressed in its Constitution and by statute the relationship between the sheriff and Sussex County.

B. SUSSEX COUNTY HAS DIRECT FUNDING AUTHORITY OVER THE SHERIFF'S OFFICE AND ITS PERSONNEL

Plaintiff argues that but for giving him the money he demands, Sussex County has no authority over him, his deputies or the administration of his office (POB, pp. 11-12). To support his position, the sheriff relies on cases decided in Wisconsin, New Hampshire, Georgia, Michigan, and Florida. He makes no reference to the Delaware Home Rule Law, Title 9, Chapter 70, or to the Delaware Constitution of 1897. If he did so, his argument fails miserably.

Sussex County Council has no intent or desire to interfere with the day to day operation of the Sheriff's Department so long as it operates within its statutory powers and the laws of the State of Delaware. Title 10, Chapter 21 of the Delaware Code enumerates the powers of the sheriff. They act primarily as an arm of the State courts to assure the smooth operations of the wheels of justice. In his treatise on Practice in Civil Actions and Proceedings In The Law Courts of the State of Delaware, Vol. I, Sec. 93 (1906), Victor Woolley stated, "Sheriffs are ministerial officers, who execute and carry into effect the orders and judgements of the court. They are county officers and are chosen by the qualified electors of each county at the general election...." If one wishes to ascertain the function of the sheriff at or near the time the 1897 Constitution was adopted, there is no better source.

The sheriff and deputies in his department have engaged in activities beyond their recognized powers and duties on several occasions. Sussex County has admonished them and told them they need to comply with the law or the County will be exposed to liability. This has fallen on deaf ears.

In October, 2011, then County Administrator David Baker sent a Memorandum to the sheriff outlining numerous infractions, including, but not limited to, stopping alleged traffic law violators, retention of special deputies, use of emergency lighting on vehicles and attempting to process warrants (David Baker Memorandum dated October, 2011 attached as Brief Exhibit 2). All of these activities fall outside the statutory duties of a sheriff. Despite this, the sheriff continued to illegally expand his duties.

As a consequence, Sussex County Council prepared a report as it related to a then pending House Bill to set forth the problems that had been caused by the Sheriff Department. See Report dated April 5, 2012 attached as Brief Exhibit 3. The rogue actions of the Sheriff Department not only had resulted in the County being exposed to potential liability but the Delaware State Police, municipal police, and the Office of the Chief Magistrate of the Justice of the Peace Court had also delivered warnings to the sheriff that his actions would no longer be tolerated. Rather than be part of the solution of law enforcement, the Sheriff Department was becoming part of the problem. As will be discussed, the end result was passage and enactment of House Bill 325.

Most recently, Sussex County Council decided not to renew a contract with the Family Court for process serving. See letter of Todd Lawson dated September 24, 2012 attached as Brief Exhibit 4. Despite the Council's decision, the sheriff unilaterally and without notice to Council or the County Administrator sought to renew the contract, but due to other things,

including several errors in the bid, it was rejected. See letter of Office of Management and Budget dated November 8, 2012 attached as Brief Exhibit 5. This *ultra vires* action of the sheriff not only was contrary to the decision of the County administration, but potentially used County funds on a project that had not proven to be cost effective. Further, he has argued he needs training for the deputies because of dangerous situations they may encounter, yet when a danger area is being eliminated he has attempted to continue exposing his deputies to such risk.

II. THE DELAWARE CONSTITUTION OF 1897 IDENTIFIES THE SHERIFF AS CONSERVATOR OF THE PEACE WITHIN SUSSEX COUNTY BUT THAT TERM IS NOT DEFINED

Plaintiff goes to great lengths to define and ascertain what or who is a conservator of the peace. He cannot identify nor define and is left with the self-serving statement, “Sheriff Christopher believes that as a conservator of the peace, he has such powers....” (POB, p. 12.)

The term “conservator of the peace” is never defined nor delineated in the various adoptions of constitutions in Delaware. The identity of who is a conservator of the peace has changed throughout the different versions. These versions are:

1. The Members of the Legislature and Privy Councils shall be Justices of the Peace for the whole state, during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties. Del. Const., Art. 12 (1776).

2. The members of the Senate and House of Representatives, the Chancellor, the Judges of the Supreme Court, and the Court of Common Pleas, and the Attorney General, shall by virtue of their offices, be conservators of the peace throughout the state; and the Treasurer, Secretary, Clerks of the Supreme Court, Prothonotaries, Registers, Recorders, Sheriffs, and Coroners, shall, by virtue of their offices, be conservators thereof, within the counties respectively in which they reside. Del. Const. Art. VIII, Sec. 1 (1792).

3. The members of the Senate and House of Representatives, the chancellor, the judges, and the attorney general shall by virtue of their offices, be conservators of the peace throughout the State; and the treasurer, secretary, prothonotaries, registers, recorders, sheriffs and coroners, shall by virtue of their offices be conservators thereof within the counties, respectively in which they reside. Del. Const. Art. VII, Sec 1 (1831).

4. The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the Sheriffs shall be conservators of the peace within the counties respectively in which they reside. Del. Const., Art. XV, Sec. 1 (1897).

This points out the identity of who a conservator of the peace is has changed over the history of the State. As Justice Holland pointed out in his treatise, The Delaware Constitution of 1897, The First One Hundred Years (DE. Bar Assoc., 1997) on pages 187-188, there is no

history as to why the term has found its way into the Delaware Constitutions and has received little judicial attention. He concludes, “Article XV, Section 1 seems to have outlived its usefulness....”² It was noted in footnote 6 to this discussion on conservator of the peace that the designation has now been conferred on several other officials including Delaware Alcoholic Beverage Control Commission officers and employees, board members and officers of park districts, probation officers and counselors appointed by the Chief Judge of Family Court, municipal court Judges in Wilmington, University of Delaware police, Capital police, and any person appointed by the State Secretary of Administrative Services to care for, clean and attend to the heating systems of state buildings. So, it is clear that even if the sheriff is a conservator of the peace, however that may be defined, he is clearly not an exclusive member of that team.

Plaintiff resorts to how that term may have been interpreted in several jurisdictions throughout the country and in doing so likens a conservator of the peace to a police officer. It has already been shown that in Delaware the Supreme Court has adopted the Attorney General’s opinion that the sheriff is not a police officer. Plaintiff also fails to identify in his dissertation of portions of decisions the genesis of the phrase “conservator of the peace” as reviewed by the various non-Delaware courts, that is, are they constitutional in origin, are they phrases in a statute, or are they terms used by the courts themselves?

The only two Delaware cases identified by Plaintiff allegedly supporting his argument are State v. Brown, 5 Del. 505 (Del. Ct. Gen. Sess. 1854) and State v. Wyatt, 89 A. 217 (Del. Ct. Gen. Sess. 1913). Both of those cases discuss the powers of a “peace officer” not a conservator of the peace. If one accepts Plaintiff’s argument that as a conservator of the peace he has full

² The complete reprint of Justice Holland’s discussion on conservator of the peace is found on page 13 of County’s Opening Brief.

powers of a peace or police officer, the extension of that argument is that the maintenance person for heating units at the courthouse also has those powers.

Plaintiff's entire argument that as conservator of the peace he has plenary authority to make arrests, engage in investigations, conduct traffic stops and is entitled to the full array of police equipment, supplies and access to information is premised on the common law. As we know, the common law in Delaware on what is encompassed as a conservator of the peace is non-existent. To make this argument, Plaintiff conveniently ignores the constitutional directives that common law may be changed and is not etched in stone.

The framers of the four constitutions of this State have assured that the laws, including the common law, may be changed. This was accomplished as follows:

The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, & c. agreed to by this convention. Del. Const. Art. 25 (1776) (emphasis added).

All the laws of this state, existing at the time of making this constitution, and not inconsistent with it, shall remain in force, unless they shall be altered by future laws; and all actions and prosecutions now pending, shall proceed as if this constitution had not been made. Del. Const. Art. VIII, Sec. 10 (1792) (emphasis added).

All the laws of this State existing at the time of making this Constitution and not inconsistent with it, shall remain in force unless they shall be altered by future laws; and all actions and prosecutions now pending shall proceed as if this Constitution had not been made. Del. Const. Art. VII, Sec. 9 (1831) (emphasis added).

All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws. Del. Const. Schedules Sec. 18 (1897) (emphasis added).

Throughout Delaware's history, there has been the constitutional authority to alter existing laws. The question then is who or what has that authority. In the case of Cohen v.

Krigstein, 114 A.2d 225 (DE. 1955), the Delaware Supreme Court was asked to decide the veracity of a sheriff's return showing the service of a summons. It was argued the method of return in that case violated the common law. The Court in examining the return ruled at pages 259-260, "The common law rule must be announced as the law of this State unless it is repealed by statute, by rule of court or by a continued and recognized practice in derogation of the common law." Justice Hermann went on to announce his opinion that the common law in this instance was archaic and urged the General Assembly to fix the problem statutorily.

The Supreme Court again addressed the power to abrogate the common law in the case of Shelhorn & Hill v. State, 187 A.2d 71 (DE. 1962). The effect of the doctrine of sovereign immunity was at issue. The Court held that it, the Court, could not change the doctrine, but that "...only the General Assembly may either waive or partially limit the applications of this ancient doctrine." Id., p. 303.

Thus, it is clear in Delaware that common law doctrines may be amended, abrogated or codified by the General Assembly. It has the authority to conform the laws of the State to the existing times.

Plaintiff argues on pages 19-23 that he should be deemed to possess extensive powers including the power of detention and arrest and the right to suppress violence and keep the peace. To that end he must be provided access to statewide investigative resources, emergency lights for his vehicles, and training. He seeks the right of *posse comitatus*, the right to conduct traffic stops, the right to transport prisoners, and the right of crowd control. As will be shown, all of those factors or claimed rights have been the subject of legislative action.

The sheriff argues that he needs these powers and rights to protect the citizens of Sussex County. In fact, Sussex County Council and the Delaware State Police ("DSP") have already

addressed the safety needs of Sussex County. In October, 2007, Sussex County Council and the DSP entered into a Memorandum of Understanding, which extended prior agreements whereby the County funded the addition of State Troopers to the barracks in Sussex County to provide protection. (See Minutes of October 30, 2007 meeting of County Council attached as Brief Exhibit 6.) In 2007, there were 175 troopers dedicated to Sussex County. Under the Memorandum of Understanding entered into in November, 2007, the number of troopers over the five-year term of the agreement increased by four (4) troopers per year. (Memorandum of Understanding attached as Brief Exhibit 7. See p. 5, Sec. 6(A).)

On August 21, 2012, this Memorandum of Understanding was extended by Sussex County Council and the DSP. (See Minutes of August 21, 2012 meeting of County Council attached as Brief Exhibit 8.) There will be forty-four (44) troopers assigned to Sussex County funded by the County Council. This is far more cost effective and fiscally responsible than creating a new police force as the sheriff advocates. Thus, the argument that the sheriff should have full police powers because there is a lack of protection for the citizens of Sussex County rings hollow. With the troopers assigned by the State and those funded by the County, there are now in excess of two hundred (200) police officers protecting unincorporated Sussex County. This does not include the municipal police forces providing further protection.

Thus, Plaintiff's arguments that he should be deemed the chief law enforcement officer of Sussex County with a full array of powers are not supported by the law nor by the conditions existing in this County. These arguments and claim for relief should be rejected.

III. SHERIFF CHRISTOPHER HAS NO DEFINED POWERS UNDER THE DELAWARE CONSTITUTION WITH ALL POWERS HE HAS CONFERRED BY STATUTE

Since there is no definition of conservator of the peace or delineation of the powers of the sheriff, all of his powers are set forth in The Delaware Code. The General Assembly set forth in 10 Del.C., Chapter 2, what duties attached to the office of sheriff. As has been shown, the General Assembly has the power to codify, abrogate or modify the common law. They have exercised that power most recently by adopting House Bill 325, a copy of which is attached to County's Opening Brief as Exhibit A. The legislative restrictions, despite the Sheriff's opinions to the contrary, are the law. By way of House Bill 325, the General Assembly has clarified all of the duties and rights that the sheriff claims but which the General Assembly has stated he does not.

Contrary to the sheriff's assertions, no constitutional amendment is necessary to detail what duties the sheriff has or does not have. As previously shown, the various versions of the Delaware Constitution all provide for a means to change the laws of the State, including the doctrines of common law the sheriff avers gives him unlimited powers. To reach his conclusion, the Plaintiff has again resorted to decisions from numerous jurisdictions but none from the State of Delaware. He had to look no further than The Delaware Constitution of 1897, Schedules, Section 18, to determine that the General Assembly has the right to change the law.

The argument that a constitutional amendment is needed to change the sheriff's authority should be rejected. First, there is no delineation of the authority or duties in the Constitution to amend. And second, the General Assembly has the right to enact law to set forth what duties he does have.

IV. HOUSE BILL 325 IS CONSTITUTIONAL

As heretofore detailed, the General Assembly has the constitutional right to enact laws which abrogate common law doctrine. In passing House Bill 325, the General Assembly exercised that power. This power has been recognized by the Delaware Supreme Court and needs to be followed by this Court.

The law as now adopted in Delaware clearly defines what powers are vested in police or law enforcement officers. If the sheriff is not identified as having those powers, he cannot claim them through resorting to the common law.

CONCLUSION

For the reasons set forth in the County's Opening Brief and this Answering Brief, as well as by the arguments raised by Defendant, State of Delaware, it is submitted that the prayers for relief in the Second Amended Complaint should all be denied. Plaintiff has failed to present any justifiable reason why the relief sought should be granted.

Respectfully submitted,

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